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NTSB Order No. EA-3480

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-10125

v.

EDWARD W. MAYER,

Respondent.

OPINION AND ORDER

Both the Administrator and the respondent timely filed Notices of Appeal from the initial decision of Administrative Law Judge Joyce Capps, issued orally at the conclusion of an evidentiary hearing held on October 4, 1989.¹ The Administrator then timely filed an appeal brief on November 24, 1989.² Respondent, on November 29, 1989, requested an

¹An excerpt from the transcript containing the initial decision is attached.

²The 50th day following the date of the law judge's initial decision fell on a holiday. Therefore, it was permissible for the brief to be filed on the following day. See 49 C.F.R. § 821.10.

extension of time to file an appeal brief and, in fact, filed his appeal brief on that date. However, the Board, through its General Counsel, denied the motion to file a late appeal, as the appeal did not demonstrate good cause for respondent's failure to act within the prescribed time period.³

Therefore, the appeal filed by the respondent in this proceeding will be dismissed because it was not perfected by the filing of a timely appeal brief, as required by § 821.48(a) of the Board's Rules of Practice, 49 C.F.R. Part 821,⁴ and in this opinion we will only address the issue raised in the Administrator's appeal.

The law judge affirmed the Administrator's allegation that respondent violated §§ 91.87(b), 91.87(h), and 91.125 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) when, on December 19, 1988, respondent acted as pilot in command of an aircraft that he landed without obtaining the necessary clearance from air traffic control.⁵ The law

³The reason cited by respondent for his failure to timely file an appeal brief was "law office failure" and a misplaced client file.

⁴"§ 821.48 Briefs and oral argument."

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief."

judge nevertheless reduced respondent's sanction from a suspension period of 30 to 20 days. The Administrator appealed the reduction in sanction.⁶

After consideration of the Administrator's brief and the entire record, it is the Board's determination that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety.

⁵The sections of the FAR pertinent to this case state:

"91.87 Operation at airports with operating control towers.

* * *

(b) Communications with control towers operated by the United States. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, the pilot in command may operate that aircraft and land if weather conditions are at or above basic VFR weather minimums, visual contact with the tower is maintained, and a clearance to land is received. If the aircraft radio fails while in flight under IFR, the pilot must comply with § 91.127.

* * *

(h) Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC. ..."

"91.125 IFR radio communications.

The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible--

(a) The time and altitude of passing each designated reporting point, or the reporting points specified by ATC, except that while the aircraft is under radar control, only the passing of those reporting points specifically requested by ATC need be reported;

(b) Any unforecast weather conditions encountered; and

(c) Any other information relating to the safety of flight."

⁶Respondent did not file a reply to the Administrator's appeal brief.

The order of suspension, which served as the complaint, reads, in part, as follows:

- "1. You are the holder of Airline Transport Pilot Certificate No. 450635.
2. On July 10, 1988, at approximately 2005 local time, you acted as pilot in command of a Piper PA34 civil registration N38339 owned by another, under instrument flight rules (IFR), with a student, on a flight which landed at Sikorsky Memorial Airport, Bridgeport, Connecticut.
3. At the time of said flight, Sikorsky Airport had an operating control tower operated by the United States.
4. Incident thereto, you operated your aircraft within the Sikorsky Airport traffic area without maintaining two-way communications with [the] control tower.
5. On said flight, you operated under IFR in controlled airspace without maintaining a continuous watch on the appropriate radio frequency.
6. Subsequently, you landed your aircraft at Sikorsky Airport without a clearance from ATC."

Respondent testified that he filed an IFR flight plan prior to the flight and that flight conditions were IFR when he reached Milum intersection (approximately six miles from the airport). He claims that he tried several times to establish radio contact with the tower at Sikorsky Airport but was unsuccessful. He contends that flight conditions subsequently became VFR, and since he could not contact ATC, he decided to land the aircraft as soon as practicable. The Administrator maintains that respondent's actions were unsafe, as there was another aircraft on the runway preparing to take off. In addition, the Administrator presented

evidence that two controllers issued red light-gun signals to respondent instructing him not to land the aircraft. Despite the warnings, respondent landed the aircraft, whereupon he contacted the control tower with a transmission that was "loud and clear."

Based on the evidence presented at the hearing, the law judge found that the Administrator established by a preponderance of the evidence all the violations cited in the suspension order. She determined that the respondent must have had a "lapse in alertness in that the approach clearance was misconstrued somehow as being a landing clearance." The law judge found that 1) no request for a landing clearance appeared on the tape of radio communications received by ATC and none was given; and 2) two red light-gun signals were issued in an effort to warn respondent not to land.

The Administrator contends that the law judge reduced the sanction without offering a clear and compelling reason for doing so, as required by Administrator v. Muzquiz, 2 NTSB 1474, 1477 (1975). He further bolsters his argument with Administrator v. Pearson, 3 NTSB 3837 (1981), where we found that when the charges set forth in an order of suspension have been proved, the Administrator's "judgment on the proper term of suspension should be accepted, since it presumably rests on a determination that a sanction of a specific duration is warranted to vindicate the various enforcement interests the individual charges collectively implicate."

Id. at 3838.

In the instant case, the only explanation the law judge gave for the reduction in sanction was that "Respondent uses his certificate as his sole means of livelihood." As we have stated before, this is inadequate justification for reducing the sanction. See e.g., Administrator v. Throckmorton, NTSB Order No. EA-3214 at 7-8 (1990).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is dismissed;
2. The initial decision is modified to affirm the Administrator's order; and
3. The 30-day suspension of respondent's Airline Transport Pilot Certificate shall begin 30 days from the date of service of this order.⁷

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).